Supreme Court, U. S.
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NO. 75-274

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

REBECCA BIBBS, as Administrator of the Estate of WAYNE BIBBS, Deceased, and HOMER BIBBS and REBECCA BIBBS, individually,

Petitioners,

vs.

THE UNITED STATES,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners,

vs.

THE UNITED STATES,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in this case on May 30, 1975.

OPINION BELOW

The opinion of the United States Court of Claims is not yet reported and is printed in the appendix to this petition.

JURISDICTION

The judgment of the Court of Claims dismissing the petitioners' complaint was entered on April 25, 1975. A timely petition for rehearing was denied on May 30, 1975 (appendix). The jurisdiction of this Court is invoked under 28 U.S.C. §1255.

ISSUE PRESENTED FOR REVIEW

1. Is the within action within the jurisdiction of the Court of Claims since it is based upon a breach of contract.

2. Is the within action within the jurisdiction of the Court of Claims since it is based upon the violation of a regulation of an executive department of the United States?

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. §1941:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any act of Con-

gress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . . "

5 U.S.C §22
"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property pertaining to it."

10 U.S.C. §133
"(b) The Secretary is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and §401 of title 50, he has authority, direction and control over the Department of Defense".

10 U.S.C. §3012
" (b) The Secretary is responsible for and has the authority necessary to conduct all affairs of The Department of the Army. . . . and conduct business of The Department in such a manner as the President of the Secretary of Defense may prescribe. The Secretary is responsible to the Secretary of Defense for the operation and efficiency of the Department."

Department of Defense directive #1315.11 and Army Regulation 614-30
These regulations, in existence at the time of this enlistment, but since revised, prohibited the assignment of a soldier under 18-1/2 years of age to a combat fire zone.

STATEMENT OF THE CASE

The Plaintiffs, HOMER BIBBS and REBECCA BIBBS, individually, and as Administrators of the Estate of WAYNE BIBBS, have filed a Petition in the Court of Claims, alleging that the Army breached its contract with them, and with their minor son, and that the said breach of contract resulted in the death of their minor son, WAYNE.

The deceased, WAYNE BIBBS, was born on June 14, 1954. On September 10, 1971, while he was still 17 years of age, he sought to enlist in the Army for a three (3) year training term, to be trained in aircraft maintenance. Because of his age, he could not enlist without the written consent of his parents, and his parents refused to consent believing that WAYNE was too young to go into combat. The parents, and WAYNE, entered into negotiations with the recruiters whereby the recruiters sought to obtain the necessary parental consents, and the recruiters pointed out to the parents that WAYNE could not be sent into combat while under 18-1/2 years of age in that the law, and Army regulations, would forbid such an assignment. Knowing that the said Army and Department of Defense regulations were a part and parcel of their agreement, WAYNE BIBBS entered into an enlistment agreement with the United States, with the

written consent of his parents, which agreement provided for Wayne's enlistment and training in aircraft maintenance. It was understood and agreed by all the parties that Wayne would not be assigned to a combat zone or combat duties while he was under 18-1/2 years of age, because the said Department of Defense and Army Regulations prohibited same.

Seven months after enlisting, while Wayne Bibbs was still 17 years of age, he was shipped to the Republic of Viet Nam, and he arrived there on March 24, 1972. Immediately upon his arrival in the Republic of Viet Nam, he was assigned to the 196th Brigade, and he participated in front line combat. He made numerous protests to his superiors regarding the agreement and regulations upon which his enlistment was based.

Despite these objections, he was made a door gunner on a helicopter engaged in combat in the Republic of Viet Nam, and on June 11, 1972, while WAYNE BIBBS was still 17 years of age, he was killed by hostile enemy action while engaged in combat.

ARGUMENT

The basic question is whether the Federal Court system provides a remedy for the wrong committed here. The Plaintiffs contend that appropriate jurisdiction is given to the Court of Claims under 28 U.S.C. §1491, conferring jurisdiction upon that Court to hear claims against the United States arising out of breach of contract and claims based upon the violation of regulations of executive departments of the United States.

I. The Court of Claims Has Jurisdiction for Claims Based Upon a Contract With the United States

It is clear that 28 U.S.C. §1491 confers jurisdiction upon the Court of Claims for claims against the United States based upon an express of implied contract. Plaintiffs' petition clearly alleges a contract between the parents and the United States Army, and another between the soldier and the United States Army.

It is clear that an enlistment agreement is a contract governed by contract law, and capable of being enforced as a contract. United States v. Grimley, 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636 (1890); Bell v. United States, 366 U.S. 393, 81 S. Ct. 1230, 6 L. Ed. 2d 365 (1961); Peavy v. Warner, 493 F 2d 748 (5th Cir. 1974); Pfile v. Corcoran, 287 F. Supp. 554 (D. Colo. 1968). As stated in Pfile v. Corcoran (Ibid.) at p. 556:

> ". . . The fact that the enlistee has changed his status means that he cannot through the breach of contract throw off his status. But the change of status does not invalidate the contractural obligations of either party or prevent the contract from being upheld, under proper circumstances, by a Court of law."

It is well established that the laws which exist at the time and place of making a contract enter into and form a part of the contract, as if they were expressly referred to or incorporated in its terms. Home Building & Building Assoc. v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934); Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees vs. Railway Express Agency, 238 F.2d 181 (6th Cir. 1956) Morse vs. Boswell, 289 F. Supp. 814 (D. Md. 1968); Goldstein v. Clifford, 290 F. Supp. 275 (D.N.J. 1968). Particularly interesting are Morse v. Boswell, (supra), and Goldstein v. Clifford, both of which deal with Army Reserve enlist agreements and both of which firmly recognize this principle. To quote from Goldstein, at p. 279:

> "The enlistment instrument and the statutory law in effect when it was signed constitute the enlistment contract."

At the time of execution of the enlistment agreement here, there existed a Department of Defense directive and an Army regulation prohibiting the assignment of a soldier under 18 1/2 years of age to a combat fire zone. 1/

This directive was made pursuant to statutory authority given to the Secretary of Defense. 5 U.S.C. §22; 10 U.S.C. §133. Congress had the power to delegate to the Secretary the authority to issue directives of this nature. Lichter v. United State 334 U.S. 742, 68 S. Ct. 1294, 92 L. Ed. 1694 (1948) Royal Standard Insurance Company v. McNamara, 334 F. 2d 240 (8th Cir. 1965).

The Secretary of the Army is likewise statutorily empowered to issue Army regulations of the type involved here. 5 U.S.C. 22; 10 U.S.C. 3012. Haggerty v. Selective Service System, Local Board No. 15, Pittsburgh, Pennsylvania, 449 F. 2d 795 (3rd Cir. 1971).

Thus, the Department of Defense directive and the Army regulation, both prohibiting the assignment of WAYNE BIBS to a combat fire zone while he was under 18-1/2 years of age, became part of the enlistment contract with the soldier, and the par-

1/ Dept. of Defense Directive No. 1315.11 and Army Regulation 614.30. Both the directive and the Army regulation have since been revised, but were in effect at the time of enlistment: September 10, 1971. The existence of this Department of Defense, and this Army regulation has been admitted by the attorney for Defendant.

ental consent agreement with the parents, and both of these contracts were breached.

In addition, it should be remembered that the enlistment agreement is a valid and enforceable contract. United States v. Grimley, 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636 (1890); Bell v. United States, 366 U.S. 393, 81 S. Ct. 1230, 6 L. Ed. 2d 365 (1961). Since an enlistment agreement is a valid and enforceable agreement at law, it is governed by ordinary contract law.

When a term is mistakenly left out of a written contract, it may be inserted by reforming the contract. See Restatement of Contracts 2nd, §504:

> "Except as stated in §506 and 509-511, where both parties have an identical intention as to the terms to be embodied in a proposed written conveyance, assignment, contract or discharge, and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties, if innocent third parties will not be unfairly affected thereby."

The terms alleged here, prohibiting the assignment of the minor, WAYNE BIBBS, to a combat fire zone should be included in the enlistment agreement by this doctrine.

In the event that the terms were left out by fraud or misrepresentation, again reformation would be the appropriate remedy.

See Restatement of Contracts, 2d, §491:

> "When a written contract, conveyance or discharge owing to the fraud or misrepresentation of one party and the mistake of the other, fails to express the agreement which they had manifested an intent that the writing should express, the latter can get a decree for reformation of the writing unless precluded by the Statute of Frauds".

This very doctrine has been applied to enlistment agreements. Shelton v. Brunson, 465 F2d 144 (5th Cir. 1972); Chalfant v. Laird, 420 F.2d 945 (9th Cir. 1969).

The Court of Claims, in its order of April 25, 1975, dismissing the Plaintiffs' Petition as an action sounding in tort, over which the Court of Claims had no jurisdiction, cited as authorities cases which are clearly inapplicable to the issue presented here, and do not from a basis for said dismissal. Each of the cases cited by the Defendant and by the Court involved an actual tort. There was no contractual relationship between the parties. In Plaintiffs' case, a valid contract exists. The fact that there has been a breach of contract by some form of tortuous act does not transform a breach of contract into an action sounding in tort so as to deprive the Court of Claims of jurisdiction.

The Court of Claims has cited Martilla v. United States, 118 Ct. Cl. 177 (1950), where the Plaintiff suffered an arm injury as a result of

being called to work prematurely; Soukaras v. United States, 135 Ct. Cl. 88, cert. den. 352 U.S. 918 (1956), where Army doctors negligently treated the Plaintiff and failed to inform him of his condition; Eastport Steamship Corp. v. United States, 178 Ct. Cl. 599, 372 F. 2d 1002 (1967), wherein the Maritime Commission wrongfully withheld permission to sell a vessel to a foreign purchaser; Clark v. United States, 198 Ct. Cl. 593, 461 F. 2d 781, cert. den., 409 U.S. 1028 (1972), wherein a reservist was wrongfully called to active duty; McCreery v. United States, 161 Ct. Cl. 484 (1963), wherein a misrepresentation regarding retirement benefits was made to an employee of the Corps of Engineers; and Small v. United States, 219 F. Supp. 659 (D.C. Del. 1963), wherein the Plaintiff claimed mental distress for having sick leave credits wrongfully taken away from him. In each of the cases cited by the Court there was a simple tort, there was no contractual relationship between the parties, and there was no allegation of a contractual relationship between the parties.

Where a valid contract exists the fact that the contract was breached by means of the tortuous act of the Defendant does not transform a breach of contract into a tort for purposes of the Tucker Act. See United States v. Huff, 165 F. 2d 720 (5th Cir. 1948); Keifer and Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939); Chain Belt Company v. United States, 127 Ct. Cl. 38, 115 F. Supp. 701 (1953); Bird and Sons, Inc. v. United States, 190 Ct. Cl. 426, 420 F 2d 1051, (1970).

II. The Court of Claims Has Jurisdiction Over Claims Arising Out of Violations of Regulations of an Executive Department of the United States

It is clear that 28 U.S.C. §1491 confers jurisdiction upon the Court of Claims in matters arising out of a regulation of an executive department of the United States. Kephart v. United States, 109 Ct. Cl. 646, 75 F. Supp. 1020 (1948), where Plaintiff was not given the proper position upon a release from military service, in violation of a Federal Statute, and brought a claim to the United States Court of Claims; Greenway v. United States, 163 Ct. Cl. 72 (1963), where a civilian employee of the United States Air Force was discharged in violation of Air Force Regulations, and the Court of Claims took jurisdiction; Maddux v. United States, 20 Ct. Cl. 199 (1885), where settlers sued for compensation for building improvements taken over by the Army, pursuant to certain army regulations; Cutler-Hammer, Inc. v. United States, 194 Ct. Cl. 788, 441 F. 2d 1179 (1971), where an action was brought against the United States for not selling silver at a price determined by a Treasury Dept. regulation; and Kelly v. United States, 133 Ct. Cl. 571, 138 F. Supp. 244 (1956), where an employee sued for proper compensation when he was demoted in violation of a civil service regulation.

In all of the above cases the plaintiffs were allowed to bring an action against the United States in the Court of Claims, when the United States acted to their detriment in violation of its regulations. Certainly the Plaintiff here, who was sent to a highly dangerous combat zone, and killed as a result thereof,

all in violation of valid regulations, should likewise be able to maintain an action in the Court of Claims.

CONCLUSION

By virtue of 28 U.S.C. §1491, the Court of Claims does have jurisdiction to provide a remedy for the wrong committed here. The Court of Claims has jurisdiction in claims against the United States founded upon violation of a regulation of an executive department, and upon an express or implied contract with the United States. Clearly, there has been a violation of the contractual rights of the plaintiffs and their young son. Furthermore, there has been a violation of a valid regulation of an executive department of the United States resulting in the death of a 17 year old youth.

For reasons set forth herein, Petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 202-74

REBECCA BIBBS, as Administrator of the ESTATE OF WAYNE BIBBS, Deceased, and HOMER BIBBS and REBECCA BIBBS, individually

v.

THE UNITED STATES,

Before SKELTON, Judge, Presiding, KASHIWA and KUNZIG, Judges.

ORDER

This case comes before the court on defendant's motion to dismiss, filed September 23, 1974, on the ground that the petition sounds in tort and that this court has no original jurisdiction of tort actions. McCreery v. United States, 161 Ct. Cl. 484 (1963). Upon consideration thereof and of plaintiffs' response and of defendant's reply and of plaintiffs' response thereto, the Court concludes that the motion should be granted because the action though pleaded in a contract form is an action sounding in tort over which this court has no jurisdiction under 28 U.S.C. § 1491 (1970); Martilla v. United States, 118 Ct. Cl. 177 (1950); Eastport Steamship Corp. v. United States, 178 Ct.

Cl. 599, 372 F. 2d 1002 (1967); Clark v. United States, 198 Ct. Cl. 593, 461 F. 2d 781, cert. denied, 409 U.S. 1028 (1972); and on the basis thereof,

IT IS ORDERED that defendant's motion to dismiss is hereby granted and that plaintiffs' petition be and the same is hereby dismissed.

BY THE COURT

Byron Skelton
Judge, Presiding

Decided April 25, 1975

IN THE UNITED STATES COURT OF CLAIMS

No. 202-74

REBECCA BIBBS, as Administrator of the Estate of WAYNE BIBBS, Deceased, and HOMER BIBBS and REBECCA BIBBS, individually.

v.

THE UNITED STATES

Before SKELTON, Judge, Presiding, KASHIWA and KUNZIG, Judges.

ORDER

This case comes before the court on plaintiffs' motion, filed May 14, 1975, for reconsideration of the court's order of April 25, 1975, dismissing plaintiffs' petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument,

IT IS ORDERED that plaintiffs said motion for reconsideration be and the same is denied.

BY THE COURT

Byron Skelton
Judge, Presiding

Decided May 30, 1975

Supreme Court, U. S.
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OCT 30 1975

No. 75-274

In the Supreme Court of the United States

OCTOBER TERM, 1975

REBECCA BIBBS, ADMINISTRATOR OF THE ESTATE OF WAYNE BIBBS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-274

REBECCA BIBBS, ADMINISTRATOR OF THE ESTATE OF WAYNE BIBBS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners' son Wayne, when he was 17 years of age enlisted in the United States Army with their consent, which they claim was given only after the recruiter assured them that pursuant to Army regulations no recruit under 18 years of age could be sent into a combat zone.[1] After completing basic training in the United States, Wayne was sent to South Vietnam as a helicopter gunner and was killed by enemy fire.

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[1] 10 U.S.C. 505(a) provides in pertinent part: "[N]o male person under eighteen years of age * * * may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control."

Army Regulation 614-30, para. 8-1j(3) (o) (July 31, 1970) provides in pertinent part: "Individuals who have not attained their 18th birthday are not eligible for assignment to a hostile fire zone."

Petitioners brought this suit in the Court of Claims on June 10, 1974, seeking damages for their son's death. On April 25, 1975, the Court of Claims dismissed the suit, holding that the complaint sounded in tort and was therefore beyond its jurisdiction under the Tucker Act, 28 U.S.C. 1491 (Pet. App. 1a-2a). A petition for reconsideration was denied on May 30, 1975 (Pet. App. 3a-4a).

1. The Tucker Act confers upon the Court of Claims jurisdiction to render judgment on any claim against the United States founded upon, *inter alia*, "any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases *not sounding in tort*." 28 U.S.C. 1491 (emphasis supplied). Petitioners claim that the Court of claims had jurisdiction in this case because their complaint was based on a "contract with the United States" within the meaning of the Act.

In determining whether it has jurisdiction over a particular claim, a court must "look beyond the literal meaning of the language to ascertain the real cause of complaint." *United States* v. *Neustadt*, 366 U.S. 696, 703 (quoting from *Hall* v. *United States*, 274 F.2d 69, 71 (C.A. 10)). An examination of the "real cause of [petitioners'] complaint" demonstrates that the facts pleaded make out a case either for a violation of a standard of care established by regulation amounting to negligence, or for wrongful death. The Court of Claims therefore properly concluded that "the action though pleaded in a contract form is an action sounding in tort" (Pet. App. 1a). The Tucker Act by its terms excludes from the jurisdiction of the Court of Claims all actions "sounding in tort." See *Pearson* v. *United States*, 267 U.S. 423; *Basso* v. *United States*, 239 U.S. 602, 606-607; *Schillinger* v. *United States*, 155 U.S. 163.

2. Petitioners' alternative contention that their claim is founded on a "regulation of an executive department," within the meaning of the Tucker Act, is also without merit. Many harms caused by agents of the government could be said to violate some statutory or regulatory directive. But the historical intention of Congress to grant Tucker Act jurisdiction only over claims "not sounding in tort" precludes petitioners' construction of the Act. See Schwartz and Jacoby, *Litigation With the Federal Government* §8.105 (1970). Thus, it is established that "not every claim involving or invoking * * * a regulation" is cognizable in the Court of Claims. *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1007 (Ct. Cl.). For there to be jurisdiction in the Court of Claims, the allegation must be that "some specific provision of law [or regulation] embodies a command to the United States to pay the plaintiff some money, upon proof of conditions which he is said to meet." *Id.* at 1008. Monetary claims that do not flow from a regulation that can fairly be interpreted as mandating compensation are beyond the Court of Claims' jurisdiction, even though they "may intimately involve" an executive regulation. *Id.* at 1008-1009.[2] "Thus, conduct by a government servant, familiar as a classic tort," even though in some way involving or implicating an executive regulation, is not within the Tucker Act

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[2]Four of the five cases relied upon by petitioners (Pet. 12), involved statutes or regulations mandating the payment of money. The fifth case, *Cutler-Hammer, Inc.* v. *United States*, 441 F.2d 1179 (Ct. Cl.), was a contract case involving the question whether a particular Treasury Department regulation constituted an offer; the Court of Claims concluded that it did not.

jurisdiction as a claim founded upon a regulation. Schwartz and Jacoby, *supra*, §8.105.[3]

The regulation involved here merely provides that individuals who have not attained their eighteenth birthday are not eligible for assignment to a hostile fire zone. It in no way gives an individual under 18 who is sent to a combat zone in violation of the regulation a right to compensation for the Army's failure to follow the regulation. Thus, the death of petitioners' son resulting from an alleged violation of the regulation by the Army "smacks more of tort than of non-tortious obligation." *Eastport Steamship Corp.* v. *United States*, *supra*, 372 F.2d at 1010. See also *Clark* v. *United States*, 461 F.2d 781 (Ct. Cl.), certiorari denied, 409 U.S. 1028.[4] Whatever the characterization given the complaint by petitioners, "the gravamen of the cause of action, under normal legal theory, would be tortious as between private

[3]In *Eastport Steamship Corp.* v. *United States*, *supra*, 372 F.2d at 1009, the Court of Claims noted that in order to determine the limits of its jurisdiction under the Tucker Act "what one must always ask is whether * * * the legislation [or regulation] which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, [the Court of Claims] cannot give relief under [that part of the Tucker Act codified in 28 U.S.C. 1491], although some separate general principle—arising, for example, from tort law—might lead to a remedy in another forum or under some special relief provision."

[4]In *Clark*, Air Force Reservists sought compensation when the Air Force failed to reassign them to the Standby Reserve when their Ready Reserve Agreements expired, as the Air Force Manual required. The Court of Claims held (461 F.2d at 783): "It is clear that the claims of the plaintiffs sound in tort. They are based on the violation of the above-cited regulation by the Air Force. This court does not have jurisdiction of tort claims."

parties." *Eastport Steamship Corp.* v. *United States*, *supra*, 372 F.2d at 1013. The Court of Claims applied the same standard here and properly dismissed petitioners' complaint for lack of jurisdiction.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

[5]To read the Tucker Act as a grant of jurisdiction in this kind of case would impute to Congress an intention, in the Tucker Act, to vest the Court of Claims with jurisdiction over the torts that it excluded from the coverage of the Federal Tort Claims Act, such as claims arising out of the combatant activities of the military forces during time of war (28 U.S.C. 2680(j)) and claims arising in a foreign country (28 U.S.C. 2680(k)). None of the cases relied upon by petitioners (Pet. 12) suggests that Congress intended the Tucker Act to be read in this way and none involved claims, such as petitioners' here, sounding in tort.